

The Market Excuse

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Legalizing Gender Inequality: Courts, Markets, and Unequal Pay for Women in America. Robert L. Nelson and William P. Bridges. Cambridge, 1999. Pp ix, 393.

These days the action with respect to Title VII suits for sex discrimination is away from “bread and butter” claims for unequal pay, denials of promotions, and the like, and toward hostile environment cases alleging sexual harassment. This shift away from charges of economic discrimination is most likely a strategic response to the Court’s receptiveness to harassment claims,¹ rather than a sign that women employees no longer feel aggrieved by lower pay and restricted opportunities. Despite the increasing labor force participation of women and their entry into nontraditional fields, there is still a sizeable pay gap between men and women that is not likely to be eliminated in this generation (p 56).² Curiously, the issue of pay equity is just barely on the radar screen, even in an election year in which women’s votes are crucial and the gender gap in politics seems as persistent as the gender gap in pay.³

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¹ Notably, the Supreme Court decided a trio of sexual harassment cases in 1998, each in favor of the plaintiff. See *Oncale v Sundowner Offshore Services, Inc.*, 523 US 75, 79 (1998); *Burlington Industries, Inc v Ellerth*, 524 US 742, 765 (1998); *Faragher v City of Boca Raton*, 524 US 775, 785–86 (1998). In these cases, the Court introduced a species of strict liability to govern claims of hostile environment based on the conduct of supervisory employees.

² The latest available data indicate that for full-time, year-round workers in 1999, women earned 72 percent of wages earned by men. See *US Census Bureau, Comparison of Summary Measures of Income by Selected Characteristics: 1989, 1998, and 1999*, available online at <<http://www.census.gov/hhes/income/income99/99tablea.html>> (visited Nov 10, 2000). If weekly, rather than yearly, wages are taken into account and there is adjustment for actual number of hours worked among full-time workers, women earn roughly 75 percent of male salaries (p 56).

³ The issue of gender pay equity was raised once in the Vice Presidential debate. The moderator asked the candidates: “Gentleman, this is the 21st century. Yet, on average an American working woman in our great nation earns 75 cents for each \$1 earned by a working male. What do you males propose to do about it?” *Commission of Presidential Debates Transcripts*, Transcript of 2000 Vice Presidential Debate, available online at <[http://www.debates.org/transcripts/textfiles/CPD_Debate_2_Final_Transcript_\(English\).txt](http://www.debates.org/transcripts/textfiles/CPD_Debate_2_Final_Transcript_(English).txt)> (visited Nov 10, 2000). Senator Lieberman stated that he supported “the Equal Pay Act which has been proposed in Congress, which gives women the right to file legal actions against employers who are not treating them fairly.” Id. Secretary Cheney stated only that he supported “equal pay for equal work regardless of someone’s gender” and then went on to discuss tax relief. Id at 6. Presumably, Senator Lieberman was referring not to the Equal Pay Act of 1963, but to the proposed “Paycheck Fairness Act,” which would amend the Equal Pay Act to establish enhanced penalties for viola-

In *Legalizing Gender Inequality: Courts, Markets, and Unequal Pay for Women in America*, Robert L. Nelson and William P. Bridges chronicle the “rise and fall” of pay equity as a litigation strategy and a political issue. The authors are sociologists from the structuralist school who study political and cultural dynamics within large organizations. Their detailed study of four wage discrimination suits leads them to conclude not only that the courts missed an opportunity to rectify pay inequities in these individual cases, but that the decisions in these cases and others like them had the more profound negative effect of legitimizing gender-based wage inequality more generally.

Their principal claim is that the courts have uncritically accepted employers’ assertions that they were following the market when they set wages for predominantly female jobs at lower rates than predominantly male jobs. In each of their case studies, the authors attempt to show that it is far from clear that employers were merely following the market. The authors contend that the source of the pay differential—or at least a sizeable portion of the pay differential—resided in the employers’ own actions in setting internal pay scales to suit their organizations’ needs and values. A great strength of the book is its attention to the interplay between organizational and market forces and its dual focus on economic and sociological models. In the measured and academic tone characteristic of the book, the authors provide a metaphor that sums up their major theme:

We would be going too far if we suggested that the emperor had no clothes. At some level, organization pay levels are constrained by market conditions. But just as clothing is only partially determined by weather and locally available materials, and is heavily influenced by fashion and tradition, organizational pay structures are not just products of economic necessity. They are also creatures of convention and tradition (p 324).

As organizational theorists, Nelson and Bridges analyze the role that bureaucratic politics and cultural values play in the setting of wage rates in large organizations. The central focus of the book is on between-job disparities, the difference in pay between two jobs that are not the same (or substantially the same). Although the authors seek to explain and find ways to lessen such disparities, they do not endorse “comparable worth.” They part company with many comparable worth advocates in that they do not subscribe to a view of the market as inevitably tainted or gender-biased. Instead, they take a

tions of the Equal Pay Act and would direct the Secretary of Labor to develop *voluntary* job evaluation guidelines for employers who wish to implement comparable worth. See Paycheck Fairness Act, S 74, 106th Cong, 1st Sess (Jan 19, 1999), available online at <<http://thomas.loc.gov>> (visited Jan 10, 2001).

more benign view of the market, arguing that although it sometimes can operate to hurt or devalue women's interests, at other times, it can work to advance women's interests (p 51).

Nelson and Bridges are prepared to allow employers who actually rely on the market to defend against allegations of sex-based wage discrimination (p 351). What they object to are employers who use the market as an excuse for (or rely on market rhetoric to excuse) wage inequities that originate within the organizations themselves, when managers or personnel officials exercise their often considerable discretion to set salaries for individuals and pay scales for jobs. Their nuanced analysis of the pay systems in large organizations permits them to see these organizational structures as only loosely tied to the market, as human constructions that respond both to market and internal forces. They recommend holding employers responsible for gender-based wage disparities that are not shown to be dictated by the market, specifically by broadening the concept of disparate treatment to capture the portion of the pay gap attributable to biased organizational behavior.

Part I of this Review briefly examines the chronology of pay equity litigation before describing the authors' organizational inequality approach in Part II. Part III contains a summary of the authors' four case studies of public and private employers, paying particular attention to the mechanisms the employing organizations used in those cases to set pay in predominantly female jobs. In Part IV, I discuss the authors' basic contentions that the market does not fully explain or account for gender pay disparities between jobs, focusing on how unconscious gender discrimination may produce organizational bias in pay determinations. Part V examines the two legal theories—disparate treatment and disparate impact—that could be adapted to the Nelson and Bridges organizational inequality approach. I conclude with a proposal to revive disparate impact theory for use in pay equity disputes.

I. THE SHORT LIFE OF PAY EQUITY

The proposals contained in this book have the potential to revive prospects for large-scale pay equity litigation, which has been dormant for over a decade. Today, plaintiffs have little chance of winning a wage discrimination claim unless they can show that they are being paid less than a man for doing the same or a substantially similar job. This type of violation—addressed by the Equal Pay Act of 1963 (“EPA”)⁴—prohibits employers from exploiting women workers by

⁴ Pub L No 88-38, 77 Stat 56 (1963), codified at 29 USC § 206(d) (1994).

requiring them to work in the same position for less than a man, even when the market price for women's labor is lower than the going rate for men. In other words, in "pure" EPA cases, the market is no defense.⁵

As the authors' study of published wage discrimination cases covering 1982–95 indicates, however, plaintiffs have had much less success in court when they could not point to a predominantly male job that was equal or substantially equal in content. With Title VII (rather than the EPA) as the basis for their claims, such plaintiffs have the formidable burden of proving that the employer intentionally depressed the pay scale in their jobs because of the sex of the majority of the incumbents in the jobs.⁶ In pure "comparable worth" cases, where the work done by the plaintiff class is not even similar to that done by workers in predominantly male jobs,⁷ employers have prevailed in 90 percent of the cases (p 39), most often by claiming that they were not discriminating on the basis of sex, but simply following the market. This result is particularly bad news for closing the pay gap because a significant portion of the gender pay gap is traceable to between-job pay differences.⁸

The death knell for pay equity litigation was *American Federation of State, County, and Municipal Employees v Washington* ("AFSCME")⁹ decided by the Ninth Circuit in 1985. The plaintiffs in *AFSCME* showed that the state failed to implement its own job evaluation plan that indicated that the predominantly female jobs were undervalued—as measured by the skill, effort, and responsibility

⁵ See *Corning Glass Works v Brennan*, 417 US 188, 205 (1974) (finding that the practice of paying lower wages to female inspectors than to their male counterparts violated the EPA regardless of the fact that market rates for women inspectors were lower).

⁶ Jobs that are 70 percent or more female are typically regarded as predominantly female jobs. See, for example, *American Federation of State, County, and Municipal Employees, AFL-CIO v Washington*, 770 F2d 1401, 1403 (9th Cir 1985).

⁷ In cases in which work done by women was similar, but not identical to, work done by men, the authors' study indicated that plaintiffs prevailed in 32 percent of the cases, a rate lower than the success rate for plaintiffs in equal work cases (48 percent) but much lower than in "pure" comparable worth cases in which women's jobs were different from men's jobs (p 39).

⁸ There is much dispute regarding the precise size of the pay gap attributable to unjustified between-job wage differentials. However, there is no question that the American workplace is characterized by a high degree of gender segregation and that most women continue to work in lower-paying, low-mobility, largely segregated jobs. See US Department of Labor Women's Bureau, 20 Leading Occupations of Employed Women 1998 Annual Averages (1999), available online at <http://www.dol.gov/dol/wb/public/wb_pubs/20lead98.htm> (visited Feb 9, 2001). The persistence of the wage gap also suggests that current antidiscrimination laws focusing on within-job differentials are inadequate to solve the problem. See Sara M. Evans and Barbara J. Nelson, *Wage Justice: Comparable Worth and the Paradox of Technocratic Reform* 16 & n * (Chicago 1989). Nelson and Bridges conclude that eliminating between-job gender inequality would have a positive effect on women's wages, without quantifying how much the size of the wage gap would decrease (p 65).

⁹ 770 F2d 1401 (9th Cir 1985).

of those jobs. Now-Justice Kennedy, writing for the Ninth Circuit panel, espoused the view that the state of Washington was not responsible for the disparity—that it was merely a price taker following the market.¹⁰ In that case, the “market defense” not only served to justify the wage disparity but to eviscerate the plaintiff’s *prima facie* case; in the panel’s view, simply showing that the employer deviated from its own job evaluation plan by paying the market rate did not give rise to an inference of intentional discrimination.¹¹ Other courts followed suit,¹² with the effect that comparable worth claims virtually disappeared after 1990.

II. FOCUSING ON THE ORGANIZATION

The authors take a critical look at *AFSCME* and three other important pay discrimination lawsuits. They approach these suits principally as sociologists who study organizational behavior and how organizations create and perpetuate gender inequality and respond to market forces.

They distinguish their approach from the more dominant “law and economics” view or free market paradigm, which generally regards employers as passive price takers and believes that in the long run the market will purge itself of discrimination. Adherents of this approach¹³ are apt to regard judicial intervention as legitimate only if it is designed to open up male jobs to women, in other words, to end intentional job segregation. They are inclined to attribute the gender gap in pay to “human capital” differences between men and women, such as education, seniority, continuity of work, or other factors relating to efficiency (p 49).

The authors also distance themselves from the comparable worth paradigm, which regards between-job gender disparities as arising

¹⁰ *Id* at 1407 (“Title VII does not obligate [the employer] to eliminate an economic inequality it did not create.”).

¹¹ *Id* at 1408 (“A study that indicates that a particular wage structure might be more equitable should not categorically bind the employer who commissioned it.”).

¹² See, for example, *International UAW v Michigan*, 886 F2d 766, 769 (6th Cir 1989) (stating that “discriminatory intent may not be inferred from defendant’s failure to depart from free market parameters in determining . . . wages, even if the market can be shown to contain minor flaws”); *American Nurses’ Association v Illinois*, 783 F2d 716, 722 (7th Cir 1986) (same).

¹³ Notable examples include Richard A. Epstein, *Forbidden Grounds: The Case Against Employment Discrimination* (Harvard 1992); Daniel R. Fischel and Edward P. Lazear, *Comparable Worth and Discrimination in Labor Markets*, 53 U Chi L Rev 891 (1986). Nelson and Bridges describe Epstein’s theory as the “most extreme free market version” because he generally supports judicial intervention only in cases where the state intentionally discriminates or “where markets clearly do not operate in ways that allow workers a variety of choices of employment setting” (p 49). They regard Fischel and Lazear as advancing a “more centrist market-based view” because they support the EPA and endorse judicial intervention to eliminate gender-based barriers to job mobility within firms (p 49).

principally from the societal devaluation of women's work. Comparable worth scholars tend to regard the market as a repository of biased judgments, which have historically assigned lower worth to activities associated with women, despite the greater value of such work to individual businesses. Comparable worth theories have contended, for example, that predominantly female jobs are paid less than they are worth because female-correlated traits such as verbal skills, small motor dexterity, and facility in caretaking and human interactions are not given adequate recognition (p 72). Interestingly, the authors assert that some comparable worth theorists share a common assumption with free market scholars in that both camps locate the source of gender pay disparities in the market. The comparable worth scholars, however, regard the market itself as sex biased and oppose allowing employers to defend their wage schedules by reference to the market.

The authors describe their approach as the "organizational inequality" paradigm because they are most interested in the dynamics *within* organizations that operate to perpetuate gender disparities. Their more agnostic view of the market is that it is not solely or invariably the vehicle for the devaluation of women's labor. They maintain that some businesses might decrease the size of their gender pay gap by opening up their pay systems to market forces (p 51). Although more market-friendly than most comparable worth advocates, the authors part company with economics/free market scholars because they also believe that a sizeable portion of the current pay gap is not traceable to either market or efficiency considerations. They claim that both camps have failed to grasp that much of the pay gap is attributable to the politics within organizations and to the tendencies of organizations to reproduce the cultural advantages of its male workers (p 95).

III. FOUR CASE STUDIES

The foundation of the book consists of four case studies of major pay equity lawsuits, two involving public employers and two involving private employers. The studies are a clever way of getting inside organizations and looking at their pay records and personnel files. Sociologists rarely have had this opportunity because businesses (particularly private employers) often keep salary information secret. The authors combed the case records to ascertain the source of the pay disparities for themselves. They supplemented what they learned from the case records by reviewing other available statistical data, doing their own quantitative analyses, and conducting interviews with employees and others involved in the administration of the pay systems and the legal disputes. They call their approach "critical empiricism" (p 115).

The authors readily concede that their sample of four high-profile cases is not representative of all litigated cases nor of all pay grievances (p 112). In fact, one of the persistent points made in the book is that organizations differ and that such structural and cultural differences matter to any diagnosis of the existence, extent, and justifiability of gender pay disparities. They defend their selections, however, for their value as in-depth case studies of how pay systems actually work in large organizations. Particularly because each of the defendants in the four cases relied on paid consultants to assist them in evaluating and revising their pay systems, and because such consultants typically market their systems to many large organizations and explicitly compare the practices of their clients to others in the trade, it is likely that the pay systems investigated here bear a strong resemblance to those found in other large organizations (p 113).

Legalizing Gender Inequality exemplifies the old adage that the “devil is in the details.” The narrative the authors construct of each of the four cases is highly contextual, paying close attention to institutional histories and to the specifics surrounding the origins and day-to-day implementation of the pay structures. Because one of their key objectives is to observe the interplay between market forces and bureaucratic pay systems, the authors are especially interested in how employers actually use market surveys of wages paid by other employers, and the degree to which the employers keep records on market-sensitive data such as turnovers, outside offers to current employees, or difficulties in recruiting.

A. Two Public Employers: UNI and AFSCME

1. *Christensen v Iowa*.

The most compelling case study in the book is the dissection of *Christensen v Iowa*,¹⁴ a lawsuit brought by clerical workers against the University of Northern Iowa (“UNI”). This was the first comparable worth case in which the market defense was employed successfully to defeat plaintiffs’ claims under Title VII (pp 119–20). Prior to the filing of the lawsuit, the Board of Regents of the State of Iowa had employed the consulting firm of Hayes-Hill, Inc (“Hayes”) to institute a new system of compensation for the state universities. In the formal, impersonal bureaucratic system Hayes recommended, many of the predominantly female jobs were placed in the same job grade as predominantly male jobs, a change that would have served to equalize compensation in the different jobs. Officials at UNI balked, however,

¹⁴ 563 F2d 353 (8th Cir 1977).

at paying clerical workers the same as physical plant workers.¹⁵ UNI feared that it would be unable to attract and retain workers to physical plant jobs for the salaries that it paid employees in the clerical jobs. In response to its client's concerns, Hayes then conducted special salary surveys for several jobs and ultimately set starting pay in the physical plant jobs at a higher step within their pay grades, essentially replicating the previous pattern of gender wage inequality (p 123). The result was that after controlling for seniority, women at UNI earned approximately 23 percent less than male employees (p 122).

The critical question for Nelson and Bridges is why UNI resisted the advice of the consulting firm and seemed intent on preserving the privileged position of the predominantly male jobs, even when it may have ended up costing the university money. Was it really the market that dictated the higher wages or some other cause?

The authors found little evidence to support UNI's claim that the market required higher wages for the physical plant jobs than for clerical jobs.¹⁶ The authors conclude that UNI deployed the wage survey and the wage setting process in a way that maintained the status quo, such that even after the Hayes reform, prior pay levels (with their built-in gender disparities) continued to exert considerable influence on wage rates (p 142). In this respect, UNI was unremarkable, given the tendency among large employers to treat continuity in wages as an "organizational imperative" (p 160).

The authors concede that the university officials sincerely believed that the higher wages were necessary to attract physical plant workers and that their market rhetoric was not a deliberate cover-up for sex discrimination (pp 156–57). Rather, the kind of gender bias that Nelson and Bridges unearth in *Legalizing Gender Equality* operates largely at the unconscious level, whereby a myriad of small, low-visibility decisions end up devaluing some female jobs and, most importantly, preserving a tradition of overvaluing certain male jobs.

The most striking aspect of *Christensen* that likely contributed to UNI's perception that it could not lower the ranking of the physical plant jobs was the organizational strength of the physical plant workers. Many of the men in the physical plant had formerly worked for a large meatpacking firm in the area and had experience with collective

¹⁵ "Physical plant workers" consisted of a broad category of employees including boiler operators, security officers, craft occupations, groundskeepers, custodians, and other blue collar jobs (p 133).

¹⁶ The census data from the area gave no indication that clerical occupations were oversupplied relative to other occupations and the clerical rate of unemployment was lower than for physical plant type jobs (pp 134–35). In fact, a person interviewed for the study recalled that at one point the university had experienced difficulty competing with the premier employer in town — John Deere — for clerical workers.

union activity (p 162). Known informally as the “meatpackers,” the men in the physical plant apparently were quite confrontational in their dealings with the administration and gave them a hard time, on one occasion even engaging in an illegal strike that threatened to shut down the university (p 165). In contrast, the clerical workers were the last group in the university to organize. They rarely worked in teams and were comfortable interacting with the administration in a polite, cooperative way, limiting their discussions to amenities of employment, such as the annual Christmas party (p 164). These gender-linked differences led the university to worry about “the union guys but not the women” (p 166) when it came to setting pay rates. The authors believe that while UNI spoke in terms of the market to justify its pay scheme, it was organizational politics, rather than the invisible hand of the market, that caused the university to “give selective attention to the demands of workers in predominantly male jobs” (p 166).

The authors’ principal quarrel with the Eighth Circuit’s ruling is that it misunderstood and misrepresented the dynamics of gender inequality at UNI. They claim that by locating the source of the pay disparity in the market, without adequate empirical support for that finding, the court’s opinion helped to dichotomize the terms of the legal debate in comparable worth cases (p 168). Because the market defense proved so powerful in this case, the authors believe that future plaintiffs were pushed into the direction of rejecting market-based systems altogether. For Nelson and Bridges, a better strategy for advocates of pay equity would be to focus on how pay decisions actually get made and to question the degree to which employers deviate from the market in preserving the traditional advantages of male workers. They admit that the plaintiffs in *Christensen* might still have lost the lawsuit—particularly if the court had regarded the political efficacy of the meatpackers as a neutral reason for the gender differential in pay—but argue that a defeat couched in those terms at least would have alerted the clerical workers that collective action was the key to better pay (pp 166–68).

2. *AFSCME v Washington.*

The next case study—an analysis of the pay system in Washington state challenged in the *AFSCME* case—is the part of the book most likely to be cited and debated. There was a lot at stake in *AFSCME*: there were over 15,500 female workers in the plaintiff class, and the case presented a template for comparable worth litigation. The strategy of pay equity advocates was first, to push the state to conduct extensive job evaluation studies of state jobs, comparing predominantly male and female jobs, and second, to insist that the state had a duty under Title VII to correct the gender-based disparities revealed by the

state's own studies. The stage for the lawsuit was set when a new Governor of Washington state refused to include money in her budget for implementing the recommendations of consultants who, in three separate reports, had found that employees in predominantly female jobs were underpaid (pp 173–74).

The pivotal question in the litigation was whether there was a legally defensible reason for the state's refusal to implement comparable worth. The Ninth Circuit's endorsement of a "market defense" effectively put an end to the two-step strategy for judicial implementation of comparable worth.¹⁷ After *AFSCME*, comparable worth would come about only through legislation or collective bargaining.

The cornerstone of the authors' reanalysis of the data in *AFSCME* is their statistical analysis of benchmark jobs as compared to other state jobs. Benchmark jobs consist of a relatively small set of jobs¹⁸ that can be matched to comparable jobs in other organizations and for which external salary surveys of the market are conducted (p 176). All other jobs are then linked or indexed to these benchmarks for purposes of salary determination. Notably, no market data is typically secured for these "indexed" jobs. Thus, for a large employer like the state of Washington, the setting of wage rates for benchmark jobs is an important point at which the market interacts with (and presumably affects) the internal pay bureaucracy. Moreover, insofar as the benchmark jobs are more market-oriented than indexed jobs, any market defense by an employer would presumably be based on an assertion that the wages in the benchmark jobs effectively determined the salaries in the indexed jobs.

The authors theorize that if the market were responsible for gender disparities between different jobs, one would expect to find no higher gender disparities in the indexed jobs than in the benchmark jobs (p 178). This was not the case, however, in Washington. Instead, their reanalysis revealed a statistically significant unexplained pay gap between men and women that was significantly larger in the indexed jobs than in the benchmark jobs, after controlling for "human capital" type variables such as completed education, work experience, and good health (p 184). This suggested that there was something in the discretionary pay setting process in the indexed jobs that was exacerbating the gender wage disparity, something that originated with the employer rather than the market.¹⁹

¹⁷ After the panel decision, the state settled the case for \$100 million, apparently so as not to alienate female state employees and to end the uncertainty about the state's legal exposure, which was damaging its bond rating (p 175).

¹⁸ Benchmark jobs in *AFSCME* constituted only 6 percent of state jobs, but employed nearly 37 percent of state employees (p 180).

¹⁹ The authors also concluded that the disparity was not likely caused by something unique

A valuable contribution of this book for those who specialize in pay systems is the authors' painstaking effort to extract what that "something" might be in a system as large and diffuse as the state of Washington's. They start with the proposition that, like the officials at UNI, the bureaucrats in Washington state were committed to preserving the status quo and to maintaining continuity in relative wage rates over time (p 186). Nelson and Bridges underscore the point that both management and workers look at existing wage differentials among jobs "as a kind of natural, normative order that should be observed even when there is no clear rationale" (p 186). The force of custom can be so important that if one wants to predict what a particular wage structure will look like twenty or more years hence, the most reliable guide will often be the structure that was put in place initially, when the employer first instituted a systematic pay plan (p 186).

However, the authors contend that more than mere inertia was involved in the Washington pay system that helps to explain its persistent tendency to disadvantage workers in predominantly female jobs. A close examination of the relationship between benchmark and indexed jobs showed that heavily female indexed jobs were more likely to be paired to benchmarks that were themselves disproportionately female, even after controlling for efficiency-type factors such as type of job and job family (p 188). Because it is generally better to be indexed to a benchmark job that has a higher salary, this tying together of predominately female jobs has a depressing effect on the wages of indexed jobs that, by definition, are not independently compared to the market (p 188). Sex stereotyping of jobs then comes about through the almost invisible process of linking indexed jobs to their benchmarks, when discretion could be exercised to choose an integrated or predominantly male job as a benchmark that carries a higher salary. Additionally, in the Washington system, jobs with a higher proportion of female workers tended to deviate from their benchmark salaries far less than jobs with more male workers. Not unlike the systematic tendency to make exceptions to the starting salary for male jobs at UNI, there was a tendency to expand the pay range for male jobs in the Washington system relative to their benchmarks (pp 188-89).

The authors' quantitative analysis of the data in *AFSCME* thus established an unexplained pay gap between men and women, particularly in indexed jobs, and highlighted two decision points (tying indexed jobs to particular benchmarks and determining the size of the pay range) as moments in the salary setting process where the em-

ployer may have used its discretion to advantage male over female employees. To draw an inference of sex-biased decisionmaking from this unexplained pay gap, the authors presented a qualitative analysis of the bureaucratic politics in play in Washington state. Although the particulars differ dramatically from the meatpacker/clerical workers divide at UNI, the *AFSCME* case study also portrays women workers as politically disadvantaged in the workplace and as suffering a wage penalty in part because they lack political clout.

The wage setting process in Washington state was pervasively political and subjective. The authors describe how agency heads and unions would lobby the Department of Personnel (“DOP”) seeking salary adjustments for individuals and particular jobs. The authors discerned a pattern whereby salaries were raised in a higher percentage of cases when a change was sought by an agency or a union, as compared to actions taken on the initiative of the DOP. In other words, the DOP responded to outside pressure and to arguments from interest groups. In this political process, women workers tended to be disadvantaged because, far more often, agencies and unions represented the interests of male workers and predominantly male jobs and sought adjustments on their behalf (p 198). This comparative neglect was not like the visible gender politics present at UNI but was more characteristic of the kind of bias that finds its way into a mature, public bureaucracy like the pay system in Washington state.

In addition to explaining how bureaucratic politics might have affected the wage rates of indexed jobs through politically-inspired adjustments, Nelson and Bridges also question the degree to which salaries in the benchmark jobs were a mere reflection of the market. Litigation documents described how the salary survey itself was shaped by organizational politics. The DOP consulted agencies and employee groups to help determine the minutiae of the process, including which benchmark jobs to survey and how to write job descriptions for comparisons with other organizations (p 194). Some decisions were clearly result-oriented—the DOP looked for justification for a market rate it had in mind for a particular job. From this insider’s view of the actual operation of the wage survey, the authors arrive at the important conclusion that “[t]he market is to some extent socially constructed by the employing organization” (p 196).

Despite their documentation of the considerable influence that politics and bureaucratic inertia played in determining wages in Washington state, the authors cautiously refuse to state whether their study demonstrates actionable disparate treatment (p 201). Similar to their reservations about whether the courts would regard the UNI clerical workers’ relative lack of political clout as a legitimate, neutral reason for denying liability, the authors seem unsure of how the courts would

or should treat proof that women workers were politically powerless in *AFSCME*. They claim only that their data prove that the employer in *AFSCME* was not simply a passive price taker, but an active participant in the wage-setting process. Their modest position is that while organizations take the market rate into account in setting wages for some jobs, their pay scales clearly also reflect “considerations of political expedience, custom, and internal alignment” (p 201).

B. Two Private Employers: Sears and Coastal Bank

The other two case studies in the book are of private employers, a class of defendants that one would expect would rely heavily on the market to set wages and would be likely to plead the market defense in any comparable worth litigation. The cases selected by the authors, however, are less than ideal for analysis, for the simple fact that they are not comparable worth cases. Because there are virtually no comparable worth cases involving private sector defendants,²⁰ the authors were forced to select other kinds of wage discrimination suits. From a legal perspective, these case studies are not as illuminating as the authors’ analysis of the public sector litigation, although they do lend some additional support for their thesis that organizations, as well as the market, are responsible for gender inequality in compensation.

1. *EEOC v Sears, Roebuck & Co*

The *Sears* litigation,²¹ which forms the basis of the first private employer case study, is well known for the stunning defeat the Equal Employment Opportunity Commission (“EEOC”) sustained in its massive pattern and practice litigation against the nation’s larger retailer. The most discussed claim in the lawsuit was the charge that the company had discriminated against women in hiring and promoting employees into commissioned sales positions, positions which paid nearly twice as much as the noncommissioned sales jobs in which women predominated.²² The EEOC lost these “denial of access” claims because the courts believed Sears’s contention that women lacked interest in these traditionally male positions, a hotly debated issue in the suit that pitted two feminist historians against each other on opposite sides of the litigation.²³

²⁰ The one exception is the early case of *International Union of Electrical, Radio and Machine Workers v Westinghouse Electric Corp*, 631 F2d 1094, 1107 (3d Cir 1980), in which Judge Leon Higginbotham ruled that plaintiffs should be given a chance to prove intentional discrimination. The case settled before going to trial (p 28).

²¹ *EEOC v Sears, Roebuck & Co*, 628 F Supp 1264 (N D Ill 1986), affd 839 F2d 302 (7th Cir 1988).

²² See Martha Chamallas, *Introduction to Feminist Legal Theory* 69–71 (Aspen 1999).

²³ Alice Kessler-Harris testified for the EEOC. See Written Testimony of Alice Kessler-

.. In their case study of *Sears*, the authors concentrate on the less celebrated allegations in *Sears* that women suffered discrimination in pay for a set of jobs—known in the litigation as “checklist jobs”—corresponding to middle-level supervisors and managers. The trial court in *Sears* held that there was insufficient proof of an intentional pattern of wage discrimination against women (p 234). Given the limited evidence available to them, Nelson and Bridges conclude only that “something was wrong in Sears” (p 241)²⁴ that could not easily be explained away by market forces. They admit, however, that this particular case study does not provide unequivocal support for their model of organizational inequality (p 239).

Despite its substantial size, Sears was a model of decentralization, with a large amount of discretion lodged in individual store managers to set compensation for their employees (p 210). The case was complicated by the fact that, midway through the period covered by the litigation, Sears retained Hay Associates (“Hay”) to revamp its compensation scheme (p 211). Hay criticized compensation policies in the checklist jobs for lacking uniformity, being inefficient, and not being tied closely enough to the market. In particular, Hay recommended cost saving measures such as lowering the compensation in checklist jobs to bring them more in line with the market and changing Sears’s compensation policies with respect to geographic relocations. The axiom at Sears that “to get ahead, you had to move” (p 210) had resulted in significant increases to an employee’s base salary whenever an employee moved to take a promotion. The authors speculate that the relocation policies disadvantaged women, both in pay and promotions, because women tended to be less mobile (p 236).

Harris, *EEOC v Sears Roebuck & Co*, reprinted in 11 Signs: J of Women in Culture & Society 767 (1986). Rosalind Rosenberg testified for Sears. See Offer of Proof Concerning the Testimony of Dr. Rosalind Rosenberg, *EEOC v Sears Roebuck & Co*, reprinted in 11 Signs: J of Women in Culture & Society 757 (1986). Commentators have subsequently criticized the *Sears* court for failing to appreciate that women’s interest in nontraditional jobs is not simply a product of pre-existing preferences, but can be affected by the employer’s own actions in recruiting, describing jobs, and otherwise stimulating or depressing interest in such positions. See Vicki Shultz, *Telling Stories About Women in Title VII Cases Raising the Lack of Interest Argument*, 103 Harv L Rev 1749, 1799–1839 (1990) (challenging the notion that women bring fixed and stable work preferences to the labor market); Joan C. Williams, *Deconstructing Gender*, 87 Mich L Rev 797, 813–22 (1989) (criticizing the court’s finding in *Sears* as based on an inaccurate domesticity stereotype of women). The Nelson and Bridges structuralist approach to wage discrimination litigation strongly resembles this line of argument.

²⁴ In particular, the authors believe that the EEOC’s analysis of the wage disparity for the period of 1976–80 (the lawsuit covered the period of 1973–80) was more convincing than that presented by Sears. They state that the variables used in the EEOC’s regression equations had considerable facial validity as measures of human capital and productivity. Sears, however, used a number of measures that “were clearly and predictably associated with gender but were of dubious business value” (p 236). They also criticize the trial court for authoring an opinion that reflects “statistical naiveté that Sears turned to its advantage” (p 237).

The Hay consultants recommended abolishing the relocation raises and replacing them with a onetime increment to cover the costs of moving, so as to cut down on the wide disparities in compensation of employees doing the same job (p 236). Not all the consultants' recommendations were implemented, however. In the narrative Nelson and Bridges construct of changes at Sears, the pay consultants emerge as the force most attuned to market and efficiency concerns, while the managers in the field are portrayed as having more of a stake in the status quo.

For purposes of diagnosing the sources of gender inequality in pay, the most significant conclusion the authors draw is that the rationalization of the pay system brought about by the pay consultants probably did more to equalize compensation among gender groups at Sears than other policies in place at the time, including the affirmative action program Sears implemented to attract women to nontraditional jobs (p 240). Interestingly, the consultants did not set about to correct gender-based inequities. Rather, this byproduct occurred because their recommendations struck at the discretionary system in place prior to the consultants' intervention, a system that lacked standards and notably did not seem to track the market. Similar to the dynamic at UNI, the authors conclude that the reduction in the gender pay gap at Sears probably occurred by curbing a set of "high flying" salaries of male managers who were in the more decentralized portions of the organization (p 239).

One irony of the *Sears* litigation is that, in defending against charges of wage-based discrimination, Sears was somehow able to portray its wage determination process as rational, despite the fact that its own consultants had uncovered many inefficient and irrational practices that Sears admitted needed to be addressed. From their review of the data, the authors are unpersuaded that the market provided adequate justification for Sears's compensation programs, either before or after the Hay reform.

2. "Coastal Bank."

The fourth and final case study is of a large bank, called "Coastal Bank" for purposes of the study.²⁵ Of the four case studies, this is the only case in which the plaintiffs prevailed.²⁶ As mentioned above, however, because *Coastal Bank* was not a comparable worth case, the

²⁵ The authors explain that they decided to keep the real name of the bank confidential and to alter some of the identifying facts and dates, after securing initial access to case documents from the attorneys (p 110). Some of the data in this case, however, were still covered by a protective order and were not made available to the authors (p 246).

²⁶ After a ruling in favor of the plaintiffs at the trial court level, the bank settled for more than \$10 million in back pay and the institution of an affirmative action program (p 251).

court did not specifically address the market defense for between-job gender pay disparities. In this pattern and practice litigation, the plaintiffs alleged sex discrimination in promotions and gender disparities in pay in the same jobs.

Coastal Bank presents the classic "glass ceiling" case. During the period of the litigation, women were slowly entering into officer positions, but the upper tier of officers remained exclusively male. For professional women, exclusion from the top tier was costly, particularly since there was a huge differential (on the order of fifty-six to one) between the highest and the lowest paid employee at the bank.²⁷ Most importantly, the overall pay structure was characterized by gender inequality: regardless of their level in the bank, women's average earnings were between 70 percent to 77 percent of men's (p 260).

More so than in the other case studies, the authors portray the bank as a male bastion, possessing an organizational culture of a private men's club in which the members are selected on the basis of their ethnic and class origins, where they went to college, and whether they were outstanding athletes (p 244). To a large extent, the case study is devoted to teasing out the processes whereby male cultural advantage becomes institutionalized and is reproduced into the next generation, despite outside pressure on the bank to change its traditional ways. They credit the plaintiffs' victory largely to the testimony given by a small number of female employees at the bank who described in graphic detail the impact of sexist practices on their careers.²⁸ As in the other case studies, the primary inquiry for the authors is to discern how the gender bias crept into the formalized system of job evaluation and compensation and whether the gender inequality could be justified by the market.

The principal divide at the bank was between officers (86 percent male) and nonofficers (47 percent male). The differences between the two groups were so pronounced that the bank employed two different pay consultants to devise and revise the pay schemes for each group.

For the nonofficers, most of the gender disparity in wages came in the form of between-job differences, demonstrating that for employees lower down on the totem pole the bank tended "to pay the job," not the person (p 267). The authors identify several specific ways in which gender bias (or at least the perpetuation of male privilege) likely affected the formal pay scheme for nonofficers (p 278). Their

²⁷ The pay systems in the *Christensen* and *AFSCME* cases, for example, were more compressed: excluding the men's football and basketball coaches, the highest paid employee made approximately ten to fifteen times that of the lowest paid employee (p 256).

²⁸ One female employee testified, for example, that she was required to bring in \$25 million of business before she was made an officer, a condition not imposed on male candidates (p 250).

most important point was that, according to the bank's own wage surveys, it paid predominantly female jobs lower with respect to the market than it did predominantly male or gender-mixed jobs (p 238). As the authors describe the bank's compensation strategy, it played tough with the market for predominantly female jobs but was content to pay at or above the market for predominantly male jobs. Years later, when the banks' economists (not its managers) recommended a wage hike in several of the underpaid, predominantly female jobs, compensation in these jobs was brought more in line with the market (p 282).

When it came to compensation for officers, the mechanisms that contributed to the gender inequality in pay looked more like techniques for advantaging club "members." Reminiscent of the relocation raises in *Sears*, the single most effective means of protecting male privilege at Coastal Bank was the incentive pay or bonus system in place for the most senior officers. Although incentive pay was tied to overall bank profits, there was no close link between an individual officer's performance and his bonus. The authors conclude that senior Coastal Bank officers were extremely well paid and their compensation exceeded the market value for their jobs (p 293). For the most part, women did not share in this largess because no woman was eligible for the incentive program, and only a handful of female officers received any type of incentive pay (p 293).

Aside from the gender impact of the incentive program, women were also disadvantaged by an informal system in which managers made appeals to modify the job evaluation scheme on behalf of particular employees, a disproportionate number of whom were men. Similar to the politicized process in Washington state, the authors found "an unspoken alliance between male managers and male workers" (p 298), which prompted bosses to go to bat for men under their supervision far more often than they sought pay increases for women employees. Although Coastal Bank employed a market discourse and referred to "special market conditions" to justify its pay for high-earning officers, the authors believe that the system was only loosely constrained by the market and that the market rhetoric often rationalized and legitimated discretionary decisions made for other reasons.

Unlike the three other employers studied, Coastal Bank lost its Title VII suit. With respect to pay equity, however, the victory may not have been that significant. The remedy imposed by the court did not change the basic systems of compensation, either for officers or nonofficers. In the final analysis, the authors maintain that although individual women received compensation for lost promotions and depressed wages as a result of the *Coastal* litigation, its discretionary pay system still afforded ample opportunity to interject gender bias into decisions

on pay and allowed a gender-linked ranking of jobs to persist, all without adequate market justification.

IV. THE CASE FOR MARKET SKEPTICISM

Nelson and Bridges succeed in what I take to be their project's primary aim—to make the reader skeptical about employers' claims that the “market made me do it.” If they are right that these four employers are not mavericks whose pay practices are out of line with most large organizations (pp 112–13), their research provides a convincing case for a major shift in approach in pay equity litigation. The clear implication is that rather than treating existing wage scales as presumptively based on market prices, courts should shift to a more empirically neutral stance recognizing that wages may or may not be a function of the market, depending on the political or cultural practices of the particular organization.

The authors' organizational inequality model rests on two interrelated empirical propositions that can be investigated in specific organizations: first, that organizations follow the market only loosely when they devise and revamp their pay scales for jobs and second, that organizations only rarely take active steps to realign their wages with the current market rates. The portraits of the pay systems in the case studies are quite different than one would expect from employers intent on following the market. The authors effectively challenge the image of employers as passively paying the going rate for labor, much like stock investors pay the current price for shares of stock. Instead, the image that emerges from the case studies is of employers ruled as much by the pay bureaucracies within their own organizations, as by outside forces. Under the “organizational inequality” model, the diminished role for the market is also a function of the conception of the market itself: the organizational model highlights that, in marked contrast to the stock market example, it is often difficult to ascertain the going rate for labor. The problem of internal labor markets, the complexities and arbitrariness associated with market surveys and market comparisons, the selection of benchmark jobs, and the subjective elements that inevitably go into the process of translating wages from other organizations into a pay scheme for a particular organization, all make the market less a “given” than a social construction. Once these human features behind the construction of market rates are unmasked, it is easier to believe that organizations might play a greater role in setting wages, and in perpetuating gender wage disparities, than is commonly appreciated.

The authors' view that pay equity litigation has been built around a false dichotomy is also convincing. The appellate courts in *AFSCME* and *Christensen* followed an implicit model suggesting that, in all but

the rarest cases, between-job gender disparities could be explained either by the internal value of the jobs or by the market. Once the courts ruled that employers could justifiably rely on market rates and that it was not dispositive that female jobs were paid less than their evaluated worth, the game was over. Either way, the plaintiffs lost, because both sources of pay disparity (evaluated worth or the market) were legitimate and negated sex discrimination. Following the logic of EPA caselaw, which disallows a market defense,²⁹ plaintiffs had staked everything on convincing the courts that market rates for women's jobs were tainted and discriminatory. Had they succeeded, few organizations would have been confident of escaping liability, at least in the transition period before employers cleaned up their act, by either securing job evaluations that justified existing pay scales or raising wages in predominantly female jobs to eliminate the gender disparity.³⁰

In retrospect, it is not surprising that both sides would have bought into the false dichotomy, particularly given that the systematic nature of the gender wage gap suggested a single cause, such as the valuations embedded in the market. *Legalizing Gender Inequality* breaks the dichotomy by positing that even a systematic disparity such as the persistent disparity in wage scales between male and female jobs may well be attributable in large part to practices and procedures that differ in their particulars from organization to organization. In this account, between-job wage disparities are produced in organization after organization, in varying degrees, by the sum total of recurring, low-visibility decisions and practices. The most notable of these organizational tendencies are political pressures within organizations that tend to favor men, a strong preference for the status quo and continuity in wage rates, and policies designed to shore up the privilege of those in power (such as elites within the organization and managers). Even when organizational practices are examined under the microscope, a single cause often cannot be affixed to explain a pattern of wage inequality. If one is forced to attach a single label in any given case, "organizational bias" is apt to fit as well as the "market rate." The authors contend that the courts in the comparable worth cases were predisposed to believe that any unexplained disparity was produced by the market because the courts were familiar with market rhetoric

²⁹ See text accompanying note 5.

³⁰ The situation would have been comparable to that faced in the early 1970s by the many large employers who used unvalidated aptitude tests to select employees. After the landmark ruling in *Griggs v Duke Power Co.*, 401 US 424, 436 (1971), prohibiting tests that had an unjustified adverse impact on minorities, employers had the option of either abandoning the tests or validating them. Employers who could not validate their tests, nor find a substitute test with no adverse impact, might choose to watch their "bottom line" and hire a proportionate number of minority applicants to avoid discrimination suits.

and generally embraced a market ideology (pp 353–58). In their view, the antidote for such market faith is a dose of market skepticism and a new model that will enable courts and litigators to interpret facts in a new light.

For all its messiness and complexity, this account strikes me as highly plausible, mainly because it suggests that gender pay disparities are not qualitatively different from other gender-linked inequalities. With respect to employment discrimination law more generally, scholars are beginning to gain a more complete understanding of the processes of “unconscious disparate treatment” and “unconscious stereotyping,”³¹ that underlie subtle forms of discrimination against minorities and women in contexts such as hiring, promotion, and termination disputes. Borrowing from cognitive psychology, scholars such as Linda Krieger³² have attacked the dominant “pretext” theory of disparate treatment and forcefully criticized the implicit model of human decisionmaking most courts use when they analyze run-of-the-mill, individual disparate treatment cases. She interprets leading precedents as creating another false dichotomy: one in which employers either base their decisions on merit or engage in deliberate coverups of intentionally biased decisions. Courts reason that if there is no cover up, there is no discrimination or disparate treatment.³³

What the dichotomous model misses are the numerous unconsciously biased decisions that treat similarly situated women less favorably than men, particularly when such bias corrupts the decision-making process early on and in a manner that is not obvious to the decisionmaker.³⁴ Unconscious disparate treatment can be extremely hard to detect and to prove. The prevailing “pretext” model of individual disparate treatment is likely to miss the significance of low-visibility decisions tainted by selective memory, favoritism for in-groups, and negative stereotypes of minority groups and women. Both Krieger’s cognitive bias approach to Title VII and the organizational inequality approach espoused by Nelson and Bridges emphasize the importance of unconscious disparate treatment arising within organizations. They each provide a powerful critique of the dominant approach that presumes that employer decisions are justified (that is, based on merit or the market), in the absence of proof of deliberate

³¹ See, for example, Martha Chamallas, *Deepening the Legal Understanding of Bias: An Analysis of Devaluation and Biased Prototypes*, 74 S Cal L Rev (forthcoming March 2001); Amy L. Wax, *Discrimination as Accident*, 74 Ind L J 1129 (1999); Barbara S. Flagg, *Fashioning a Title VII Remedy for Transparently White Subjective Decisionmaking*, 104 Yale L J 2009 (1995); David Benjamin Oppenheimer, *Negligent Discrimination*, 141 U Pa L Rev 899 (1993).

³² See Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 Stan L Rev 1161 (1995).

³³ Id at 1168–74.

³⁴ Id at 1181–86.

disparate treatment. Both social science approaches help us to understand how we are liable to misattribute the cause of gender disparities when we fail to perceive the subtle mechanisms of bias in bureaucratic pay systems and discretionary supervisory judgments.

It is important to note, however, that the market skepticism endorsed by Nelson and Bridges extends only to causal assumptions about the origin of gender pay disparities and not to the judgments of worth embedded in a "true" market rate. As mentioned earlier, the authors fault comparable worth advocates for failing to acknowledge that the market can sometimes operate to reduce an inequitable wage difference between predominantly female and predominantly male jobs, as, for example, when severe labor shortages forced employers in the 1980s to raise the salaries of nurses (p 337). Their organizational inequality model does not look beneath market rates to try to discern whether devaluation and gender stereotyping play any role in depressing market rates for female jobs.³⁵

At this point in the development of Title VII law, moreover, one thing is certain. The market defense is so well entrenched that it is almost unthinkable that courts will reverse course and adopt a view of the market as inherently gender-biased and tainted. Pure comparable worth theories that depend on a critique of market rates thus have no legal traction. For this practical reason, a model such as Nelson and Bridges's that locates the source of gender bias outside the market may well offer pay equity advocates their only viable second chance at attacking between-job wage differentials. The critical question is whether the organizational inequality model can be translated into a workable Title VII claim.

V. REVIVING DISPARATE IMPACT THEORY FOR PAY EQUITY LITIGATION

There are two possible theories of liability under Title VII which could serve as the legal vehicle for the Nelson and Bridges organizational inequality model: the disparate treatment theory and the disparate impact theory. The major conceptual distinction between the two theories is that disparate treatment requires proof of discriminatory intent or motivation, while disparate impact reaches unintentional discrimination that stems from neutral policies or practices that have a

³⁵ I suspect that the authors refuse to presume societal-wide devaluation of jobs, not so much because they find the premise implausible, but because there is no easy way to disentangle that portion of the market rate that represents supply and demand, and other efficiency factors, from the portion attributable to tainted factors such as devaluation and gender stereotyping. They also may be content to trust a "true" market rate because they believe that the lion's share of the gender wage differential is attributable to organizational bias and that, in the long run, women will not be severely disadvantaged by permitting employers to rely on the market.

disproportionate adverse effect on women.³⁶ The major practical distinction between the two theories is that, since the 1991 Civil Rights Act, plaintiffs who allege intentional discrimination are entitled to a jury trial and may seek compensatory and punitive damages.³⁷ Disparate impact claims, on the other hand, are tried by the court and remedies are limited to equitable relief, including an amount for back pay.³⁸

The authors propose that disparate treatment theory be reformulated and broadened to permit challenges to the kind of gender pay disparities they detect in the four case studies (p 348). For the most part,³⁹ they dismiss disparate impact theory as ill-suited to address claims of organizational bias and as too closely aligned with discredited comparable worth theories already rejected by the courts (p 347). Unfortunately, the authors devote only a few pages to sketching out the implications of their theory for revising Title VII doctrine. They do not expect plaintiffs to pick up on their new theory in any appreciable numbers and cautiously suggest that their model might at most generate "a new set of test cases" (p 350). Recognizing the considerable expense, risk, and uncertainty that most often accompanies a new approach to a complex area of law, they turn rather quickly to reforms other than adjudication that might help close the pay gap.⁴⁰

In my opinion, Nelson and Bridges give up too quickly on disparate impact theory. I believe that there is a way to incorporate their insights about organizational bias and their approval of the market defense into a streamlined disparate impact claim geared to pay equity complaints. Before outlining such a claim, however, let me discuss the authors' view of disparate treatment and the difficulties with framing such a disparate treatment claim in the pay equity context.

³⁶ See *Teamsters v United States*, 431 US 324, 336 n 15 (1977) (articulating differences between disparate impact and disparate treatment claims).

³⁷ See 42 USC § 1981(b)(3) (1994) (compensatory and punitive damages capped, depending on the size of the employer).

³⁸ Although both types of relief are monetary, the 1991 Act treats back pay differently from compensatory damages. See 42 USC § 1981(b)(2). Back pay remains within the purview of the judge, while compensatory damages are determined by the jury.

³⁹ The authors see no problem with using disparate impact theory to challenge specific, particularized wage policies, such as the relocation bonuses used in *Sears* (p 210) or the incentive bonus system in *Coastal Bank* (p 347).

⁴⁰ For example, they recommend adoption of a "best practices model" of gender-neutral pay administration that could first be used in the public sector (pp 340-47). In addition to furnishing technical advice on how to purge job evaluations of inherent male biases, they urge employers to establish new "job families" on the basis of criteria that are not gender linked, avoiding traditional categories such as "clerical" and "physical plant" jobs (p 341).

A. The Disparate Treatment Approach

In some respects, the organizational inequality theory is neatly paired with the classic systemic (or classwide) disparate treatment claim. The systemic disparate treatment claim has typically been used to challenge recurring patterns of unequal treatment. Most often plaintiffs assert that on a regular basis supervisory employees in an organization have abused their discretion by taking race or gender into account in making hiring, promotion, or termination decisions, when they should have based their selections on merit or some other legitimate, nondiscriminatory grounds. In such pattern and practice cases, plaintiffs will attempt to ferret out the bias in the discretionary systems by showing statistical patterns disadvantaging women that cannot be explained on a nongender basis. Regression analyses that control for a variety of nongender-based variables often form the centerpiece of the systemic disparate treatment claim. Essentially, the statistics are designed to show that there is an unexplained disparity from which the factfinder might infer the existence of sex discrimination.⁴¹ To bring the statistics to life, plaintiffs will also frequently introduce anecdotal evidence in the form of individual witnesses who will testify about the sexist treatment they received from the employer.

To this extent, the systemic disparate treatment model seems to fit the kind of organizational bias that Nelson and Bridges describe in their four case studies. Many of the low-visibility discriminatory decisions, which accumulate over time to depress the pay in predominantly female jobs, resemble the subtle abuse of discretion that supervisors use when they deny jobs and promotions to qualified women. For example, a manager who lobbies the personnel department to increase the pay of men (but not women) under his supervision engages in behavior that is not qualitatively different from a supervisor who regularly recommends men (but not women) for promotion. In both systemic cases, biased behavior will emanate from a number of different actors in the organization and rarely will be formally authorized or endorsed by the company. Particularly in the early days of Title VII, courts were willing to entertain broad-based challenges to such covertly discriminatory systems, when minorities or women were grossly underrepresented in the organization.⁴²

However, I believe that adapting the systemic disparate treatment claim to fit the Nelson and Bridges organizational inequality

⁴¹ See generally David C. Baldus and James W.L. Cole, *Statistical Proof of Discrimination* 26–33 (McGraw-Hill 1980).

⁴² The Court was particularly impressed by a showing of total or virtually total exclusion of minorities. See *Teamsters v. United States*, 431 US 324, 342 n 23 (1977) (“[T]he company’s inability to rebut the inference of discrimination came not from misuse of statistics but from ‘the inexorable zero.’”).

model would make it extremely hard for plaintiffs to establish a *prima facie* case and might not even result in liability in cases similar to the four case studies in the book. Considerable difficulty would stem from the fact that, in their *prima facie* case, plaintiffs would presumably have to rule out the possibility that the defendant based its pay scale on the prevailing market rate for predominantly female jobs. Because the market is not presumed to be gender-biased or tainted by inherent sex discrimination under Nelson and Bridges's approach, it can serve as a legitimate, nondiscriminatory reason for treating women less favorably than men. In their statistical case, plaintiffs could perhaps rule out the market as a causal explanation by performing the kinds of sophisticated quantitative analyses the authors present in their case studies, for example, by showing that there was a gender disparity in wages for indexed jobs that was significantly higher than that for benchmarked jobs. To bolster their quantitative case, plaintiffs might also present testimony relating to the actual operation of the pay systems, highlighting, for example, the many points in the process where supervisors have discretion to make decisions that affect the relative pay of men and women in the organization, such as selecting which jobs to incorporate in the employer's market survey or implementing the procedure for granting exceptions to the normal pay for certain positions. Such qualitative testimony could educate the factfinder about the complexities of the process of setting salaries and might well dispel the misconception that employers have little input or choice when it comes to compensation decisions.

As the authors seem to recognize, however, few plaintiffs will be in a position to mount such a challenge. To rule out the market as a source of the pay disparity requires extensive analysis of data which documents the employer's interactions with the market, such as market surveys, turnover rates, records pertaining to outside offers, and the like. In most instances, it will also require the plaintiff to secure independent evidence, outside of company records, relating to market wages for certain positions and the supply of labor in the relevant geographic labor market. This showing is even more onerous than that required in systemic disparate treatment cases involving hiring or promotions where the baseline for determining disparity is the proportion of women in the available labor market. In such cases, the actual applicant pool can sometimes serve as a proxy for the available labor market. In pay equity disparate treatment cases, however, it may often be difficult to determine whether there is a gender disparity worth investigating without reliable information about market wages. In short, if plaintiffs have to make a showing as sophisticated as that presented by the authors in their case studies, there will likely be few test cases.

If, however, one accepts the authors' position that the market rate is presumptively fair (or at least not presumptively unfair), requiring plaintiffs to rule out the market as the potential source of the gender wage disparity might seem equitable. Under the disparate treatment model, proof that the employer followed the market is not strictly speaking a defense, but a competing explanation for the gender wage disparity that serves to undercut plaintiffs' charge of sex discrimination. Although the burdens of proof in systemic disparate treatment cases have not been articulated with the same precision as they have been in individual disparate treatment cases⁴³ and in disparate impact cases,⁴⁴ it is unlikely that courts will shift the burden to employers to prove that they followed the market. As long as plaintiffs are required to rule out the market as a source of disparity in their prima facie case, moreover, employers will have little incentive to acquire and maintain market-oriented data on compensation, such as data on outside offers and turnovers, making it that much more difficult for plaintiffs to amass sufficient evidence for a prima facie case.

Another formidable obstacle that plaintiffs may encounter in a reformulated disparate treatment claim is convincing the court that even gender pay disparities not justified by the market are the product of intentional sex-based discrimination. There is still considerable question as to whether "unconscious disparate treatment" is actionable under Title VII's disparate treatment branch of liability. Some courts look not just for proof of disparity in treatment linked to gender, but are unwilling to infer intent absent proof of gender hostility or gender animus.

Further, it is now clear that, with respect to claims of individual disparate treatment, any reason other than one based on sex will suffice to rebut an inference of discrimination, regardless of whether that reason is related to a business purpose or promotes the efficient running of the operation. A showing of personal animosity,⁴⁵ for example, can defeat a charge of intentional race discrimination, even though a rational business would not base its personnel decisions on such grounds. In individual disparate treatment cases, the courts have embraced a formal approach to equality and have permitted employers to escape liability if they can articulate a plausible, non-sex-based ra-

⁴³ The most important Supreme Court cases discussing the allocation of burdens of proof in individual disparate treatment cases are *Reeves v Sanderson Plumbing Products, Inc.*, 120 S Ct 2097, 2108 (2000); *St. Mary's Honor Center v Hicks*, 509 US 502, 508-09 (1993); *Texas Department of Community Affairs v Burdine*, 450 US 248, 253-56 (1981); *McDonnell Douglas Corp v Green*, 411 US 792, 802 (1973).

⁴⁴ The 1991 Civil Rights Act codified the burdens of proof in disparate impact cases. 42 USC § 2000e-2(k)(1)(A) (1994).

⁴⁵ See *St. Mary's Honor Center*, 509 US at 508-09.

tionale for their action, regardless of the subjective or irrational nature of the decision.

In the type of pay equity challenges described in the case studies, employers would often be able to come up with an explanation for the gender-based pay disparity that is formally gender neutral, even though the disparity may not be justified by market or efficiency considerations. For example, in the *Christensen* case, UNI could point to the greater political clout of the activist "meatpackers" as the ostensibly neutral reason for paying more attention to the concerns of the men in the physical plant than those of the female clerical workers.⁴⁶ In *AFSCME*, it could also be argued that the disadvantage women suffered as a result of the politicized process of lobbying for salary adjustments with the Department of Personnel⁴⁷ was not due to the employees' gender as such. Instead, the employer could be expected to claim that the disparity was due to the gender-neutral fact that, when agencies and unions were involved in lobbying for adjustments, the DOP bowed to political pressure and made upward adjustments. In both of these cases, women's disadvantage stemmed from their lack of political clout compared to men. Under disparate treatment theory, however, political powerlessness may well be regarded as a gender-neutral factor, even though it disproportionately hurts women workers.

In the same vein, it is not clear how a court facing a disparate treatment claim would treat an employer's assertion that at the time it set the pay rate for a predominantly male job, it sincerely believed that it was responding to the market, although it later turned out to have paid more than the market rate. The UNI officials, for example, probably sincerely believed that higher salaries for physical plant workers were necessary to attract qualified men to the position, although the authors make a strong case that they overestimated the male workers' market position (pp 153–56). Under a disparate treatment rubric, even evidence of mistaken judgments may not be enough to prove intentional discrimination if the factfinder is not convinced that the defendant harbored animus toward women. Particularly with respect to the myriad of decisions that have a tendency to preserve the advantages of incumbent male workers, but on their face show no hostility toward women, it is not easy to predict whether a court would draw an inference of intentional sex discrimination or allow the case to be sent to the jury.

Finally, the courts in a systemic disparate treatment claim patterned after the organizational inequality approach will likely be

⁴⁶ See text pp 586–87.

⁴⁷ See text p 590.

called upon to assess the validity of an employer's explanation that it failed to ameliorate a gender wage disparity in predominately female jobs because it wished to maintain continuity of wage rates in its organization.⁴⁸ Employers will likely argue that this preference for the status quo does not suffice to prove sex-based discrimination, unless the plaintiff can prove that the original pay system was intentionally discriminatory. This inquiry into the history behind the current pay system would presumably require plaintiff not only to prove that there were prominent gender pay disparities between male and female jobs from the beginning, but that the original pay system was not itself based on the market. For this reason, proof that a current system perpetuates prior discriminatory practices—the so-called “present effects of past discrimination model”—fits more comfortably under discriminatory impact theory than it does under disparate treatment theory.

Although they do not detail the problems of proof under a disparate treatment model, Nelson and Bridges appear to be cognizant of many of these obstacles and urge the courts to stretch the concept of “intent” in systemic pay equity cases. They argue that in pay discrimination cases courts

should begin to move away from a standard of culpability, in which the touchstone of liability is evidence of invidious intent, toward a standard of *responsibility*, in which the touchstone of liability is wage differentials that *cannot be explained by genuine market and efficiency considerations*. In large organizational contexts, the concept of intentional discrimination—which implies individual animus against women—is a kind of construction. Absent the smoking gun, the courts are forced to draw inferences about what motivated various employer policies. Rather than continue this fiction, we suggest courts begin to give greater weight to the systemic aspects of pay determination to decide whether a pay system operates to produce and maintain *unjustified* male-female wage differences (p 349) (emphasis added).

It is telling that, in describing their reformulated disparate treatment model, Nelson and Bridges speak of the market rate as a “justification” for an employer pay rate, rather than as an explanation that serves to disprove plaintiffs’ assertion of intentional sex-based discrimination. Additionally, their proposed shift in emphasis from “invidious intent” to “employer responsibility for wage differentials that cannot be explained by the market or efficiency considerations” suggests that they do not believe that employers should escape liability

⁴⁸ See text pp 585–86.

whenever they offer ostensibly neutral explanations for gender wage disparities that do not make good business sense. The authors seem to regard as unlawful any wage differential that adversely affects women employees if it is not justified by the necessity of the market. In short, what Nelson and Bridges envision as their reformulated disparate treatment claim bears a strong resemblance to the structure of disparate impact litigation. Rather than stretch "intent" and disparate treatment to fit the organizational inequality model, it is worth revisiting disparate impact theory to see if it is better suited to capturing the kind of unconscious bias that pervades the pay setting process.

B. The Disparate Impact Approach

The paradigmatic disparate impact claim involves a challenge to a specific policy, such as an employer's use of a high school education requirement or physical strength test, that in practice screens out a disproportionately high number of minority or female applicants.⁴⁹ The social harm the disparate impact claim is designed to address is the obstacle that even a neutral policy can pose to the employment opportunities of a group that has historically been relegated to an inferior position in the hierarchy of the workplace. When a policy or practice is proven to create such a barrier to group advancement, the employer is required to justify its continued use by demonstrating that the policy is job related and consistent with business necessity.⁵⁰ In the disparate impact framework, business necessity is an affirmative defense. The employer's interest in running an efficient operation can override the plaintiffs' interest in securing employment or in obtaining opportunities comparable to more privileged groups in the workforce. Because intent is not the issue, moreover, employers may not escape liability under disparate impact simply by articulating a neutral explanation for the disparity, unless that explanation amounts to proof of business necessity.

Even this brief account of disparate impact theory suggests how it could be adapted to fit the organizational inequality model. Under both theories, efficiency considerations—whether called "business necessity" or "the market"—are treated as justifications for practices that have a widespread adverse impact on plaintiffs. The authors, however, are reluctant to embrace disparate impact and express some of the same reservations that courts in the 1980s articulated when they

⁴⁹ See, for example, *Dothard v Rawlinson*, 433 US 321, 324 (1977) (challenging height and weight requirements); *Griggs v Duke Power Co.*, 401 US 424, 426 (1971) (challenging high school diploma requirement and aptitude test).

⁵⁰ The 1991 Civil Rights Act codified the disparate impact claim and provided that the employer has the burden of proving "that the challenged practice is job related for the position in question and consistent with business necessity." 42 USC § 2000e-2(k)(1)(A)(i).

rejected disparate impact as a viable theory for comparable worth claims (pp 347–50). Yet, interestingly enough, the very model provided by Nelson and Bridges undercuts the logic of the courts' reservations and paves the way for disparate impact theory under their new analysis of the causes of gender wage disparities. The following discussion summarizes the three most prominent reasons courts rejected disparate impact in comparable worth cases in the 1980s and briefly explains why those reasons lose their force once one integrates the premises of the organizational inequality model into current Title VII doctrine.

The most formidable obstacle to the use of disparate impact theory to challenge between-job wage differentials was the courts' insistence that the setting of wages in the context of a competitive market was not the sort of "policy" that Title VII was designed to address. As the authors explain, the courts embraced a dichotomous view of the causes of gender wage disparity that largely presumed that any wage disparity not traceable to the internal worth of the job was attributable to the forces of the market. Comparable worth/disparate impact challenges were thus styled as challenges to an employer's practice of following the market. One important case, for example, declared that disparate impact theory was unavailable because there was no affirmative employer policy open to challenge in such circumstances:

Every employer constrained by market forces must consider market values in setting his labor costs. Naturally, market prices are inherently job-related, although the market may embody social judgments as to the worth of some jobs. Employers relying on the market are, to that extent, "price takers." They deal with the market as a given, and do not meaningfully have a "policy" about it in the relevant Title VII sense.⁵¹

Treating the employer as a passive follower of the market is precisely the empirical claim that the authors dispute in *Legalizing Gender Inequality*. To replace the dichotomous view of the causes of wage disparities, Nelson and Bridges offer three possible sources for between-job wage differentials, namely, internal job worth, the market, and organizational bias. The model of organizational inequality emphasizes that employers routinely construct and revise their own wage policies and that employers can meaningfully be said to *have* policies on compensation. Insofar as the early cases were predicated on the opposite premise, Nelson and Bridges' research suggest that they were wrongly decided.

⁵¹ *Spaulding v University of Washington*, 740 F2d 686, 708 (9th Cir 1984).

The next obstacle to the use of disparate impact theory in broad-based pay equity litigation was the lower courts' view that the domain of disparate impact extended only to objective policies, such as educational requirements and physical strength tests, and did not encompass challenges to subjective practices. Several courts in the 1980s took the position that disparate treatment theory was the exclusive method for challenging discretionary decisionmaking⁵² and concluded that a plaintiff must cite a specific objective practice before invoking disparate impact. This ban against applying disparate impact to subjective procedures constituted an additional reason for refusing to scrutinize an employer's wage policies because they embodied a myriad of discretionary decisions over the course of time.⁵³

After the *AFSCME* decision had rejected comparable worth as a viable cause of action, the Supreme Court removed this obstacle to the application of disparate impact theory. In *Watson v Fort Worth Bank & Trust*,⁵⁴ the Court held that "disparate impact is in principle no less applicable to subjective employment criteria than to objective or standardized tests."⁵⁵ The Court expressed concern that discretionary practices, as much as objective policies, could have "precisely the same effects as a system pervaded by impermissible intentional discrimination"⁵⁶ and should not be immune from disparate impact scrutiny. In particular, the Court noted that while a disparate treatment claim might be able to capture intentional discrimination, "the problem of subconscious stereotypes and prejudices would remain."⁵⁷ It is significant that the Court apparently regarded disparate impact, rather than disparate treatment, as the theory best designed to address unconscious bias, even though such bias may also be characterized as "unconscious disparate treatment." In any event, the holding of *Watson* appears to authorize disparate impact challenges to discretionary systems that allow unconsciously biased judgments to accumulate and systematically to disadvantage women.⁵⁸ *Watson* thus seems hospitable to the type of challenges envisioned by the organizational inequality model.

⁵² See *Pouncy v Prudential Insurance Co*, 668 F2d 795, 801 (5th Cir 1982); *Heagney v University of Washington*, 642 F2d 1157, 1163 (9th Cir 1981).

⁵³ See *Spaulding*, 740 F2d at 709.

⁵⁴ 487 US 977 (1988).

⁵⁵ *Id* at 990.

⁵⁶ *Id* at 990-91.

⁵⁷ *Id* at 990.

⁵⁸ Significantly, the 1991 Civil Rights Act confirmed *Watson* by providing that disparate impact is established if "a complaining party demonstrates that a respondent [employer] uses a particular employment practice that causes disparate impact . . ." 42 USC § 2000e-2(k)(1)(B)(i). The Act presumably reaches all employment practices, making no distinction between objective and subjective practices.

Finally, the courts rejected broad-based disparate impact challenges to pay systems because they regarded such claims as insufficiently particularized. To assure that claims were manageable and not unduly burdensome to defend, courts sought to limit disparate impact to cases in which plaintiffs could point to the precise policy that caused the adverse impact. Justice Kennedy's opinion in *AFSCME*, for example, argued that a broad-based challenge to the wage scales in predominantly female jobs entailed "the assessment of a number of complex factors not easily ascertainable, an assessment too multifaceted to be appropriate for disparate impact analysis."⁵⁹ In the court's view, the employer's compensation program consisted of multiple practices and policies and was not a "*single* practice that suffices to support a claim under disparate impact theory."⁶⁰ Nelson and Bridges share this concern and assert that it would be "unwieldy to ask an employer to defend a market-based system only because women make statistically less than men in such a system" (p 347). In language that seems to reflect the free market paradigm, rather than their own organizational inequality approach to wage disparity, the authors go on to explain that "[t]he market principle is not a focused decision-making policy, but rather involves myriad judgments about particular jobs and individuals" (p 347).

With one important modification, this requirement of particularity was written into the 1991 Civil Rights Act amendments governing disparate impact liability. Under the Act, plaintiffs are required to show that "each particular challenged employment practice causes an impact."⁶¹ An exception to the particularity requirement is allowed, however, "if the complaining party can demonstrate to the court that the elements of [an employer's] decisionmaking process cannot be separated for analysis."⁶² In such cases, "the decisionmaking process may be analyzed as one employment practice."⁶³ The pragmatic approach of the 1991 Act thus seeks to limit the employers' burden to defend, except in those cases in which it is impossible for plaintiffs to pinpoint the precise practices that produce the disparate impact.

The particularity requirement is the one remaining objection to disparate impact theory that might justifiably prevent its use in pay equity cases challenging disparities alleged to be caused by organizational bias.⁶⁴ As I see it, the problem arises because it is difficult to as-

⁵⁹ 770 F2d at 1406.

⁶⁰ *Id.* (emphasis added).

⁶¹ 42 USC § 2000e-2(k)(1)(B)(i).

⁶² *Id.*

⁶³ *Id.*

⁶⁴ An additional doctrinal issue that may pose an obstacle to the use of disparate impact theory in sex-based wage discrimination cases involves interpretation of the Bennett Amend-

certain whether disparities in wages between comparably evaluated predominantly male and predominantly female jobs are caused by the market or by organizational bias. Under disparate treatment, plaintiffs are assigned the burden of eliminating the market as a possible cause of the disparity. If a disparate impact challenge is allowed, however, the employer will have to prove that its wage policy was a "business necessity" and thus would have to establish and prove the market defense.

The critical question boils down to whether the courts will regard an employer's wage policy as "one employment practice" for purposes of pay equity litigation and relieve plaintiffs of the particularity requirement. Although this question turns on whether the court concludes that the "elements of an [employer's] decisionmaking process cannot be separated for analysis," it is likely that in making this technical determination the court will consider the fairness of imposing evidentiary burdens on the respective parties. In cases in which plaintiffs offer a well designed job evaluation to prove that predominantly female jobs are paid less than comparably evaluated predominately male jobs, is it fair to require the employer to prove that it actually follows the market? This important question was not answered in *AFSCME* and similar cases because, if we subscribe to Nelson and Bridges's major thesis, the courts simply assumed that the employers based their compensation schemes on the market. They asked the normative question of whether the market *should be* a defense. They did not analyze the issue of the proper assignment of the burden of proof, once it was appreciated that the disparity could be caused by either the market or by bias within the organization.

In support of disparate impact theory, plaintiffs could argue that it is practically impossible for them to pinpoint the cause of the wage disparity and that it makes sense to require the employer to prove that its compensation policies are indeed market based. Such an assignment of the burden of proof would encourage employers to acquire and maintain market-oriented data on compensation and might

ment to Title VII, 42 USC § 2000e-2(h), which attempts to harmonize the general prohibitions of Title VII with the more specific provisions of the EPA. In *County of Washington v Gunther*, 452 US 161, 171 (1981), the Court incorporated the four affirmative defenses of the EPA into Title VII. The fourth affirmative defense—authorizing employers to base their wages "on any factor other than sex"—may be interpreted to preclude disparate impact analysis, because, by its very nature, disparate impact addresses the adverse effects of non-sex-based neutral policies, in other words, the disparate impact of "factors other than sex." However, if plaintiffs could prove that a wage disparity was caused by organizational bias of the sort described by Nelson and Bridges, it should not be regarded as a "factor other than sex," but as a kind of unconscious sex bias not authorized by the EPA. See Martha Chamallas, *Women and Part-Time Work: The Case for Pay Equity and Equal Access*, 64 UNC L Rev 709, 742-49 (1986) (discussing interpretation of Bennett Amendment and the fourth affirmative defense).

have the salutary effect of checking the tendency to overvalue some predominantly male jobs. Additionally, unlike the onerous requirement of test validation that prevents many employers from using standardized tests that have a disparate impact, courts could approach the market defense pragmatically. If the employer adduced probative evidence that its wages were in line with the market for the years in question, that should suffice to satisfy its burden. Such an allocation of the burden of proof would treat the market defense as a contestable empirical issue and as a true defense.

Further, under disparate impact theory, the fact that female employees lack political power, or are not as well organized as male workers, would not defeat claims of pay equity. The 1991 Civil Rights Act makes it clear that a practice that produces disparate impact may be justified only if it is "job related for the position in question and consistent with business necessity."⁶⁵ Facially neutral reasons that are not job related or based on efficiency do not qualify as acceptable justifications under this branch of liability. Under disparate impact, the balance is struck in favor of equal employment opportunity when the employer's reasons go beyond what is necessary for the firm to compete in the marketplace. This predetermined balance also means an employer's preference for wage continuity will not serve to justify gender wage inequality because, under disparate impact theory, the status quo is vulnerable to attack if it cannot be justified by business considerations. More so than disparate treatment, the disparate impact theory requires employers to reevaluate and replace even traditional practices that are generally accepted if they no longer serve the business interests of the enterprise. It is a theory of liability based upon proof of two central empirical propositions—adverse effects and business necessity—that change with changing workplace demographics and the contingencies facing the business. Importantly, the principal remedy for disparate impact violations is to require the employer to change its practices and procedures to eliminate adverse impact in the future.⁶⁶ In the pay equity context, this would mean that an employer might be forced to redesign its compensation system to reduce pay disparities in predominately female jobs, perhaps by implementing some of the suggestions made by Nelson and Bridges for gender-neutral pay administration (p 340).

In the final analysis, whether disparate impact theory can be revived for use in pay equity cases may prove to be the determining factor. If disparate impact were available to challenge the pay systems in

⁶⁵ 42 USC § 2002e-2(k)(1)(A)(i).

⁶⁶ Plaintiffs in disparate impact cases may recover back pay, but not compensatory or punitive damages. See text accompanying note 38.

Christensen and *AFSCME*, for example, the plaintiffs would most likely have won. The compensation systems in each of these cases had a clear adverse impact on female employees, and Nelson and Bridges convince me that the employers in those cases would have had a very difficult time establishing the market defense. It is far less certain that the plaintiff would have prevailed in these cases under the reformulated disparate treatment claim proposed by the authors. Even if they succeeded in making out a *prima facie* case through the presentation of quantitative analyses and qualitative testimony about the operation of the pay systems, they might still fail to convince the court that such organizational bias was tantamount to intentional gender discrimination. For this reason, I conclude that the organizational inequality approach is better suited to disparate impact theory and that *Legalizing Gender Inequality* implicitly makes a strong case for bringing back disparate impact, this time with a market defense.

CONCLUSION

Compared to responding to the dramatic forms of sex discrimination and sexual abuse, providing a viable legal claim to achieve pay equity for women may not seem urgent. The harm inflicted by the undervaluation of predominantly female jobs and privileging of male-dominated work is only visible in the aggregate and over time. Pay disparities of as little as 10 percent, however, can have an enormous impact over the course of a woman's working life. Lower pay translates into lack of financial independence, less political and cultural influence, and less security upon retirement. *Legalizing Gender Inequality* is important because it challenges a widespread belief about the gender pay gap, namely, that women are paid less because that is how their labor is rationally valued in the market. By its finely grained descriptions and analyses of how large employers actually make decisions about pay, it permits us to entertain the possibility that employers sometimes use the market as an excuse for decisions that have more to do with bureaucratic politics and resistance to change than market forces. The organizational inequality approach offered by Nelson and Bridges does not simplify matters. Instead, it complicates matters by exposing the human agency behind wages, markets, and bureaucratic structures. In this instance, however, complexity is enlightening and may conceivably alter the legal frameworks used to determine whether sex bias has depressed the value of an honest day's work.